MOTION FILED
DEC 18 1991

No. 91-849
No. 91-865

In the
Supreme Court of the United States
October Term, 1991

Board of Education of
Community Consolidated School District No. 21,
Petitioner,

v.

Illinois State Board of Education and
Sheldon and Pauline Brozer, on behalf of Adam Brozer,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MELINDA L. SELBEE
Counsel of Record

General Counsel
ILLINOIS ASSOCIATION OF SCHOOL BOARDS
200 West 22nd Street, Suite 249
Lombard, Illinois 60148
(708) 629-3776

No. 91-849
No. 91-865

In the
Supreme Court of the United States
October Term, 1991

Board of Education of
Community Consolidated School District No. 21,
Petitioner,

v.

Illinois State Board of Education and
Sheldon and Pauline Brozer, on behalf of Adam Brozer,
Respondents.

MOTION OF THE ILLINOIS ASSOCIATION OF SCHOOL BOARDS TO FILE BRIEF AS AMICUS CURIAE

The Illinois Association of School Boards (hereafter "IASB") respectfully moves this Court for leave to file the attached *Amicus* brief in support of Petitioner, Board of Education of Community Consolidated School District No. 21. Counsels for Petitioner and Respondent Illinois State Board of Education (Petitioner in No. 91-865) have granted their consent to this Motion, as indicated in the attached letters. Counsel for the Respondent Sheldon and Pauline Brozer on behalf of Adam Brozer has not consented.

The IASB is a voluntary non-profit association. It is organized pursuant to *The Illinois School Code* which declares that the activities of associations so organized constitute a public purpose. *Ill. Rev. Stat.* ch. 122, par. 23-1, *et seq.* IASB serves to aid and assist boards of education in performing their lawful functions and to promote, support, and advance the interests of public education in Illinois.

The IASB has 870 member school districts. Its governing body is a Board of Directors composed of members of local school boards whose combined experience gives the IASB a unique depth of understanding of the practical and legal considerations relevant to the operation of local school districts.

Each school district member of IASB will be affected by the Seventh Circuit's decision in this case. This decision jeopardizes their ability to effectively devise and implement appropriate educational placements under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* By virtue of its membership, organization, and leadership, the IASB is in a position to describe the impact of the Seventh Circuit's failure to follow this Court's precedent.

For these reasons, the IASB respectfully requests the Court to grant this Motion to file the accompanying *Amicus* brief.

Respectfully submitted,

Melinda Selbee
Counsel of Record

General Counsel
Illinois Association of School Boards
200 West 22nd Street
Lombard, Illinois 60148
(708) 629-3776

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF THE AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 2

ARGUMENT 2

I. The Seventh Circuit's Decision Creates a Standard for Determining the Appropriateness of an Educational Placement Which Is Contrary to Precedent, Confusing, and Unworkable. 3

II. The Seventh Circuit's Decision Will Impede the Efforts of School Districts to Provide Handicapped Children with an Appropriate Public Education. 7

III. The Seventh Circuit's Decision Creates Severe Hardships on School Districts and Will Dramatically Increase Conflict Between Parents of Handicapped Children and the Local School District. 8

TABLE OF AUTHORITIES

CASES: PAGE

Bertolucci v. San Carlos Elementary School Dist., 721 F.Supp. 1150 (N.D. Cal 1989) 5

Board of Education v. Brozer, 938 F.2d 712 (7th Cir. 1991) 2, 3

Board of Education v. Rowley, 458 U.S. 176 (1982) 2, 3, 4, 5, 6

Cain v. Yukon Public Schools Dist. I-27, 775 F.2d 15 (10th Cir. 1985) 6

Doe v. Defendant 1, 898 F.2d 1186 (6th Cir. 1990) 6

G.D. v. Westmoreland School District, 930 F.2d 942 (1st Cir. 1991) 5

Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987) 5

Lachman v. Board of Education, 852 F.2d 290 (7th Cir. 1988), *cert. den.*, 488 U.S. 925 5

Manuel R. v. Ambach, 635 F.Supp. 791 (E.D.N.Y. 1986) 5

STATUTES: PAGE

Individuals with Disabilities Education Act
(formally Education of the Handicapped Act)

20 U.S.C. § 1400, *et seq.* 2

20 U.S.C. § 1415 (e) 7

Ill. Rev. Stat. ch. 122, par. 23-1, *et seq.* 1

No. 91-849
No. 91-865

In the
Supreme Court of the United States

October Term, 1991

Board of Education of Community Consolidated
School District No.21,
Petitioner,

v.

Illinois State Board of Education, Douglas C. Cannon and
Sheldon and Pauline Brozer on behalf of Adam Brozer,
Respondents.

BRIEF AMICUS CURIAE OF
ILLINOIS ASSOCIATION OF SCHOOL BOARDS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Curiae, Illinois Association of School Boards (IASB), is a voluntary non-profit association organized pursuant to Illinois law to aid and assist boards of education in performing their lawful functions and to promote, support, and advance the interests of public education in Illinois. *Ill. Rev. Stat.* ch. 122, par. 23-1, *et seq.* The IASB has 870 member school districts. Its governing body is a Board of Directors composed of members of local school boards whose combined experience gives the IASB a unique depth of understanding of the practical and legal considerations relevant to the operation of local school districts.

The issues raised in the decision below will impact each school district member of the IASB and are exceptionally important to their ability to effectively devise and implement appropriate educational placements under the Individuals with Disabilities Education Act (formally Education of the Handicapped Act), 20 U.S.C. § 1400 *et seq.* (hereafter "IDEA").

REASONS FOR GRANTING THE WRIT

For almost ten years, Illinois school districts have assessed their responsibility under federal law to provide an appropriate educational placement for handicapped children by using the standard announced by this Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In the decision below, the Seventh Circuit's requirement for an appropriate placement exceeded the *Rowley* standard. The Seventh Circuit's decision distorts *Rowley*, is contrary to those of other Circuit Courts of Appeals, and involves a significant question of federal law.

ARGUMENT

Introduction

Illinois school districts are gravely concerned by the Seventh Circuit Court of Appeals decision in this case, reported at 938 F.2d 712 (7th Cir. 1991). Petitioner, Consolidated School District 21 (hereafter "District"), after rigorously adhering to all procedural requirements, proposed an educational placement under the IDEA for Adam Brozer. *Id.* at 714. The state hearing officers and the District Court found that the hostile actions of Adam's parents, and those actions alone, prevented the proposed placement from being appropriate under the IDEA. *Id.* at 714-15. The Seventh Circuit concurred.

Illinois school districts fear and expect that this case will be widely used by parents who, until now, had no way of imposing their preferred placement. Further, school districts

expect this case to increase conflict between themselves and parents, resulting in a dramatic increase in federal court litigation. Finally, school districts expect this case to result in inappropriate placements for handicapped children whose parents successfully sabotage the district's efforts. Such consequences are avoided by a proper application of *Rowley*.

Circuit Judge Wood, Jr.'s dissenting opinion offers significant insight into the problems created by the majority opinion. *Amicus* IASB submits that his reasoning and conclusions are compelling and represent a proper application of *Rowley*. Circuit Judge Wood, Jr. warns that the approval of "unreasonable parental interference will precedentially cause school authorities additional future problems they do not need." *Brozer, supra* at 719. *Amicus* IASB joins in this warning; only action by this Court can forestall these problems.

I. The Seventh Circuit's Decision Creates a Standard for Determining the Appropriateness of an Educational Placement Which Is Contrary to Precedent, Confusing, and Unworkable.

Against the many challenges to their educational placements under the IDEA, Illinois school districts have relied on the standard for appropriateness announced in *Rowley*. A school district's proposed placement is appropriate, according to *Rowley*, if, in accordance with the IDEA's procedures, the individualized educational program (hereafter "IEP") is reasonably calculated to enable the child to receive education benefits. *Id.* at 203. The Seventh Circuit's decision herein distorts the *Rowley* standard and delivers the determination of appropriate placement into the hands of biased and untrained parents, provided they are sufficiently subversive to poison their child's mind against a reasonable and properly developed IEP.

Like the parents in the present case, the Rowleys were not satisfied with the school's proposed placement; they demanded a sign language interpreter in all of their

daughter's classes. *Id.* at 184-85. They argued that the IDEA's requirement that their child be provided a "free appropriate public education" (hereafter "FAPE") means that the educational placement be designed to maximize the child's potential. *Id.* at 198. Chief Justice Rehnquist (then Justice Rehnquist) rejected the Rowleys' interpretation of FAPE. Instead, he emphasized the word "benefit" in the statutory definition of FAPE and concluded that a placement is appropriate if it permits the child to benefit educationally from instruction. *Id.* at 200-204. The educational program developed for Amy Rowley satisfied this standard and it was unnecessary for the school district to provide Amy with the interpreter.

From 1982 until the Seventh Circuit's decision herein, educational placements have been judged by the standard announced in *Rowley*. Now, however, Illinois school district placements are also judged by whether the parents' behavior might intervene to sabotage an otherwise appropriate placement. While *Rowley* recognized the important role parents have in the development of a child's individual educational program, it nowhere suggested that parental preference should prevail when the parents have impaired a proposed placement's potential effectiveness for the child.

The Seventh Circuit's standard is unworkable. The decision below awkwardly affixes a new analytical construct to a framework that has been functioning smoothly for nearly ten years. *Rowley* is not broken, it requires no fixing.

Most troubling, the second tier of analysis imposed on *Rowley* by the Seventh Circuit is driven solely by irrational and counterproductive parental behavior. Under the decision below, the clinical manifestations of particular handicapping conditions become secondary to parental obstinacy; the judgment of impartial educational experts is subordinated to irrationality.

Decisions since *Rowley* have examined IEPs to determine if they are calculated to enable the child to receive education benefits. These cases typically involve parents seeking reim-

bursement for the cost of private education for their handicapped child when they believe that the program proposed by their local school district is inappropriate. Courts, with the exception of the Seventh Circuit in the present case, have refused to broaden or in any other manner modify the standard announced in *Rowley*. Observed the First Circuit:

> Following *Rowley*, courts have concluded that a FAPE may not be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice. Barring higher state standards for the handicapped, a FAPE is simply one which fulfills the minimum federal statutory requirements. *See, e.g., Lachman* [*v. Board of Education*], 852 F.2d [290] at 297 [(7th Cir. 1988), *cert. den.*, 488 U.S. 925] ("Parents have no right . . . to compel school district to instruct handicapped child in one specific method when district's method allows child to benefit from his education and progress toward his IEP goals."); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) ("We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide (student) with educational benefits."); *Manuel R. v. Ambach*, 635 F.Supp. [791] at 794 [E.D.N.Y. 1986] (question is one of reasonable calculation of educational benefits; it "seems irrelevant" whether "one program is better than the other."); *Bertolucci* [*v. San Carlos Elementary School Dist.*], 721 F.Supp. [1150] at 1156 [N.D.Cal. 1989] (question of "better results" at another school does not affect district's placement if latter is appropriate: "The hearing officer was correct in focusing primarily on the District's placement, rather than on the alternative that the family prefers.").

G.D. v. Westmoreland School District, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original).

Likewise, courts have sustained IEPs under the *Rowley* standard where: there was evidence of a breakdown in the mutual efforts of the school district and parents to provide

an appropriate education for a handicapped child plus evidence that the child received little benefit from the program offered by the local school, *Cain v. Yukon Public Schools Dist. I-27*, 775 F.2d 15 (10th Cir. 1985), and where the parents frustrated the implementation of the IEP and the IEP was never given a chance to succeed, *Doe v. Defendant 1*, 898 F.2d 1186 (6th Cir. 1990).

School districts need guidance on the appropriate standard used to judge IEPs. The responsible individuals — professional educators and school board members — are confused by the lack of consistent treatment of a standard for assessing their recommended educational placements. The Seventh Circuit's standard is different from that announced in *Rowley* and its progeny, as illustrated above. The conflict between these decisions needs to be resolved by this Court in order to lessen the likelihood that federal courts will be besieged with such requests.

The reward unreasonable parental hostility will receive is a fundamental concern in this case. Parents, quite understandably, are emotionally attached to their opposition to an IEP. Parental opposition often manifests itself in heated discussions — after all, it is their child's education they are discussing. The decision below, however, provides an incentive for increasing the typical emotional simmer to a raging boil. The goals of the IDEA cannot be accomplished when unreasonable parental opposition is a reason for rejecting an otherwise appropriate placement.

The Seventh Circuit's decision requires school districts to initially determine whether parental hostility will pose a threat to the success of an IEP — an arduous task considering that the hostility will likely escalate as the matter progresses through administrative and judicial proceedings. As a practical matter, school districts may accede to parental placement demands fearing that the parents, armed with the decision below, will eventually prevail. Of course, if the parents prevail, the school district suffers the additional burden of paying the parents' attorney fees and related costs

pursuant to 20 U.S.C. § 1415 (e).

II. The Seventh Circuit's Decision Will Impede the Efforts of School Districts to Provide Handicapped Children with an Appropriate Public Education.

Chief Justice Rehnquist recognized that the quest for an appropriate placement for a handicapped child is properly left to the state and local schools. He stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child.

Rowley, supra at 207. The decision below undermines the state's and local school district's traditional role in choosing an educational placement by allowing parents to veto an otherwise appropriate placement by behaving in an unreasonable and hostile manner.

Emotion and opposition are present when parents disagree with a proposed placement. The decision below supplies the final ingredient in the recipe for defeating an otherwise appropriate placement — poison the child's mind toward the placement. Parents with the desire and motivation to accomplish that goal will often succeed; it is naive to think otherwise. A child will be affected by strong parental objection and will adopt that objection as his own. Every time this happens, is the IEP no longer calculated to enable the child to receive educational benefits? If so, this result subverts the IDEA's goal of providing handicapped children with access to a free public education.

It is dangerous educational policy to allow parents to control special education placement. Parents are typically ill-equipped to make placement decisions concerning their own child. Seldom do they have professional education training. Seldom do they know the variety of placement options available. Seldom do they know of particular conditions, such as

over-crowding. Seldom have they observed their child's classroom behavior and demeanor on a routine basis. Seldom are parents able to set-aside their emotional involvement to make an unbiased decision.

Parental attitudes should not be able to undermine an otherwise appropriate placement, no matter how extremely the parents are willing to behave. The desires of parents may be diametrically opposed to the best interests of the child. The focus of the IDEA should remain on the child, rather than the behavior of the parents.

III. The Seventh Circuit's Decision Creates Severe Hardships on School Districts and Will Dramatically Increase Conflict Between Parents of Handicapped Children and the Local School District.

School districts frequently face parents who disagree with the appropriateness of a proposed placement. The facts in the present case , therefore, are not new or unique. What is new and even startling is the deference given parental objection. The Seventh Circuit has given parents instructions on how to obtain their preferred placement for their handicapped child: poison the child's mind to the school district and its proposed placement by hostile attitudes and actions. These instructions will dramatically increase conflict between parents and local school districts.

With parents encouraged by the decision below to engage school districts in heated conflict over IEPs, a multitude of new conflicts will spill over into federal courts. Federal judges will be frequently called upon to decide if parental conduct has poisoned an otherwise appropriate placement. To defend these actions, school districts will suffer the loss of two valuable resources: time and money.

The Seventh Circuit's decision herein will alter the character of meetings to develope IEPs for handicapped students. A cooperative, conciliatory atmosphere will be replaced by antagonism as soon as the parents reasonably believe that the school district is disinclined to favor their preferred

placement. The best educational interests of the child cannot be assessed and discussed by individuals engaged in heated confrontation.

Parents who favor a private school placement can require the public school to pay the tuition by behaving in a combative, hostile matter. The local public school will be obligated to pay for the private placement even though it was the parents' action which made it impossible for the local school district to educate the child.

The impact of the decision below is clear: increased animosity between parents and local public school districts, increased litigation, increased expenses for defending otherwise appropriate placements, and increased expenses for placements in private schools. The goals of the IDEA are hampered when parental emotion is allowed to control educational placements. *Amicus Curiae* Illinois Association of School Boards submits that the petition for certiorari should be granted.

Respectfully submitted,

Melinda L. Selbee
Counsel of Record

General Counsel
Illinois Association of School Boards
200 West 22nd Street
Lombard, Illinois 60148
(708) 629-3776